

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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:
AIDA ELZAGALLY, et al., : Criminal Action No.
:
Plaintiffs, :
:
versus : 1:19-cv-853 and 1:20-cv-170
:
KHALIFA HAFTAR, et al., : September 29, 2020
:
Defendants.:
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The above-entitled Motions hearing was heard, via
teleconference, before the Honorable Leonie M. Brinkema,
United States District Judge.

A P P E A R A N C E S

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Tonia M. Harris OCR-USDC/EDVA 703-646-1438

P R O C E E D I N G S

(Court proceedings commenced at 11:56 a.m.)

THE COURT: All right. I'm going to call first the case of Aida Elzagally, et al., versus Khalifa Haftar. Civil action 19-853.

All right. And we have counsel for that case?

MR. GILL: Yes, Your Honor. Faisal Gill for the plaintiffs.

MR. LEVIN: Good afternoon, Your Honor. Duncan Levin for defendant, Khalifa Haftar.

THE COURT: All right. Now, this is a case involving seven counts. We have the Alien Tort Claim Act. We have the Torture Victim Protection Act. And then we have five Virginia state law claims.

And we have before us today the defendant's motion to dismiss, which raises multiple grounds, some of which dovetail with the other case, which is 20-cv-170. Which there is an overlap of some of these issues about whether we have a political question involved here, whether the claims are justiciable. We have -- so there is an overlap. I'm assuming, however, that we should -- I'm not assuming, I'm going to assume that we should take the two cases, to some degree, separately.

Has there -- I want to ask defense counsel -- and who is going to be the main spokesperson for the defense?

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4

1 MR. LEVIN: I'm sorry, Your Honor?

2 THE COURT: Who is the main spokesperson?

3 MR. LEVIN: This is Duncan Levin.

4 THE COURT: All right. Mr. Levin, you're going to
5 be in both cases?

6 MR. LEVIN: Yes, Your Honor. In this case, the --
7 if I may refer to them just as a shorthand. One starts with
8 2019, and one starts with 2020. So if it pleases the Court, I
9 could refer to one as the '19 case and one as the '20 case.

10 THE COURT: We're on -- we're on '19 right now.

11 MR. LEVIN: Correct. And so, for this case, I
12 represent defendant, Khalifa Haftar. And on the '20 case, I
13 represent three defendants: Khalifa Haftar and his two sons,
14 Khalid and Saddam Haftar.

15 THE COURT: Right. I recognize that.

16 All right. And we have a different group of
17 plaintiffs and we have different plaintiff's counsel, correct?

18 MR. GILL: Yes, Your Honor.

19 THE COURT: All right. But I want to look at 853,
20 the '19 case first.

21 MR. LEVIN: Yes, Your Honor.

22 MR. GILL: Yes, Your Honor.

23 THE COURT: All right. Mr. Gill.

24 MR. GILL: Yes, Your Honor.

25 THE COURT: All right. What actual evidence do you

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1 have in this case that supports your theory that your clients'
2 families were somehow targeted by the defendant?

3 Wait a minute.

4 (Telephone interruption.)

5 MR. GILL: I'm sorry, Your Honor. I can't hear you.

6 THE COURT: I know. We can't work if we have this
7 much calling in. This is becoming difficult to hear you all.

8 (Telephone interruption.)

9 THE COURT: Counsel, we're not going to work if we
10 have this many people calling in. I can't control it right
11 now.

12 (Telephone interruption.)

13 THE COURT: I'm going to continue this matter until
14 3 o'clock this afternoon, gentlemen. There's too many people
15 calling in. I'm going to arrange it so that only the
16 attorneys can call in on this call. There's too much
17 interference with these beeps.

18 MR. GILL: Your Honor, if I may, I think that's
19 fine, but it may just be because it's noon right now and it
20 will quiet down in one minute as it turns into noon. And if
21 everyone can mute their line, I think people will probably
22 stop calling in in about a minute.

23 (A pause in the proceedings.)

24 THE COURT: We'll try one more time and if it gets
25 bad again, we're just going to continue the case.

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1 (Continued telephone interruption.)

2 THE COURT: It's too many calls. All right. We're
3 going to stop this. We'll reconvene at 3 o'clock. We'll make
4 the phone call. We'll set it up this way, but I'm not going
5 to have anybody calling in except for counsel. All right.

6 MR. GILL: Yes, Your Honor.

7 MR. LEVIN: Yes, Your Honor.

8 THE COURT: Thank you. Bye-bye.

9 **(Proceedings recessed at 12:01 p.m.)**

10 (Court proceedings recommenced at 3:06 p.m.)

11 THE COURT: Counsel, I hope that we are now quietly
12 on the phone. So these are the two related cases of Aida
13 Elzagally, et al., versus Khalifa Haftar, et al. Civil action
14 19-cv-853.

15 And Muna al-Suyid, et al., versus Khalifa Haftar, et
16 al. Civil action 20-cv-170.

17 So let's start off again with counsel.

18 Mr. Faisal Gill, are you there for the plaintiff,
19 Elzagally?

20 MR. GILL: Yes, Your Honor, I am.

21 THE COURT: All right. And then for our other
22 plaintiff, is it Mr. Carroll?

23 MR. CARROLL: Yes, Your Honor.

24 THE COURT: All right. And you're the only two
25 attorneys representing the plaintiffs; is that correct, for

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1 today's hearing?

2 MR. GILL: We're the only two that will be speaking.

3 THE COURT: All right. It's going to be important
4 when you speak to say your name first so my court reporter can
5 get you.

6 And now, for the defense, Mr. Levin, it's still you
7 for the defendants in both cases, correct?

8 (No response.)

9 THE COURT: Mr. Levin, are you there? Hold on.
10 We're trying to get you, Mr. Levin.

11 (A pause in the proceedings.)

12 THE COURT: Mr. Levin, are you there? Is there
13 anybody on the phone for the defendants? Hello?

14 MR. UNGVARSKY: Judge, this is attorney Edward
15 Ungvarsky. I am on the phone. I can hear you. Mr. Levin can
16 hear you. He's present on the call.

17 (Telephone interruption.)

18 THE COURT: I don't know what that grinding sound
19 is. We're getting a real problem.

20 Mr. Levin -- why are we not able to get him,
21 Counsel, do you know?

22 MR. UNGVARSKY: No. He was on. He spoke to your
23 law clerk and then I know she took his number and she said
24 that we would be unmuted. Mr. Levin is suggesting that he
25 redials in now.

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1 THE COURT: All right. Go ahead and have him
2 redial.

3 MR. UNGVARSKY: All right. He can hear you, Judge.
4 He heard you say that, Judge, so he's going to hang up.

5 While he does that, Judge, I'm going to put mute on
6 myself so there's no background noise from my room.

7 THE COURT: Thank you.

8 (A pause in the proceedings.)

9 MR. UNGVARSKY: Judge, Mr. Levin is back on -- this
10 is Edward Ungvarsky. I apologize. Mr. Levin is back on the
11 call. He says that, again, the automatic message says he's in
12 "listen-only mode." He thinks he needs to be unmuted.

13 THE COURT: I don't know why we're having these
14 problems. Let's try for a couple more minutes.

15 (A pause in the proceedings.)

16 MR. LEVIN: I think I was unmuted now. This is
17 Duncan Levin.

18 THE COURT: All right.

19 MR. LEVIN: Sorry about that.

20 THE COURT: That's fine. Again, when you all are
21 speaking, if you'll just, again, state your name so that we
22 get the right words attributed to the right attorney, all
23 right, because we are on the record.

24 As we started out earlier, we have the defendant's
25 motions to dismiss. And I think we had started with the

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1 853 -- sorry, the -- the case filed in 2019, which is cv-853.
2 And that's the Elzagally versus Khalifa Haftar. Just one
3 defendant in that case.

4 So it's your motion, Mr. Levin. You may start.

5 MR. LEVIN: Well, thank you, Your Honor. I would
6 say that there are so many different reasons that this case
7 should not go forward and should be dismissed, respectfully.

8 The first is that the plaintiff could not properly
9 serve the defendant in this case. And beyond the problem of
10 service, there are two other sort of major problems hanging
11 out before even getting into the fact that they did not make
12 out a cause of action under the TVPA.

13 One is that this is a nonjusticiable political
14 question. The Court is basically being asked to adjudicate
15 the conduct of the armed forces of a foreign government that
16 is actively working with the United States to try to bring
17 peace to the region. And General Haftar is entitled to
18 immunity under this suit, under law, because he is the head of
19 the state.

20 And then, if the Court could even get past all of
21 those problems, which we submit are fatal problems, there
22 are just fundamental problems with the plaintiff's allegations
23 because they don't show any cause of action under the TVPA.
24 The magistrate judge's support and recommendation picked up on
25 the fact that there really is, other than very general

1 allegations about random shelling, there's just not any
2 evidence alleged by the plaintiff that these -- that the
3 acts meet the definition of extrajudicial killing. That they
4 were -- that, you know, any of these killings were deliberated
5 in any way.

6 And they also go -- show that they've exhausted
7 their remedies in Libya, which is a requirement, as well. The
8 Virginia tort actions should be dismissed, as well, because
9 they hinge on -- a reading of the Alien Tort Claims Act just
10 cannot be sustained because none of the conduct that's alleged
11 touches and concerns the United States.

12 So I don't know if there's a particular order you
13 would like me to address any of those in. But I would just
14 say we have so many different bases by which we submit that
15 this case should be dismissed. That in order for it to go
16 forward, the Court would have to find: One, that this was
17 properly served on General Haftar. Two, that he is not the
18 head of the state. Three, that this is a justiciable
19 political question.

20 And then after getting through all of that, that
21 they're actually the cause of action under the TVPA that these
22 plaintiffs have alleged. There are just so many problems on
23 the way to get there that -- and we submit that the Court need
24 not find on all of them. But any number of them, any one of
25 them would be enough to get this case dismissed.

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11

1 THE COURT: All right. Well, Mr. Levin, let me ask
2 you this question.

3 MR. LEVIN: Yes, Your Honor.

4 THE COURT: In the *Samantar* case, which both sides,
5 I think, have cited to, that I had several years ago, it was
6 the defense attorney who had aggressively, initially reached
7 to the State Department to try to get their position on some
8 of the same issues you're raising, both political question and
9 head of state immunity.

10 Have you -- and the first of these two cases was
11 filed back in June of 2019.

12 Have you done anything along those lines on behalf
13 of your clients?

14 MR. LEVIN: Well, Your Honor, the answer is no. But
15 I respectfully submit that we do not even need to get to that
16 issue before. There are easier ways to have this case
17 dismissed on service grounds. The nonjusticiable political
18 question does not require the executive branch to weigh in.
19 But on the head of state immunity question, solely looking at
20 that one doctrine, frankly, I think that this situation is
21 different because, number one, plaintiffs have not -- if they
22 don't believe that General Haftar is the head of state,
23 they've offered no reason to believe that anybody else is the
24 head of the state. So they have not actually identified any
25 alternative person who is the head of the state.

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1 Libya is at civil war right now. In fact, there's
2 been a development since we filed our motion to dismiss on
3 this point. As recently as September 12th, the Associated
4 Press is reporting that the United States Embassy in Libya is
5 specifically in direct negotiations with General Haftar to
6 reopen oil field terminals that have been under an eight-month
7 blockade.

8 So this is something that even since we filed the
9 motion to dismiss, there's evidence of direct negotiations
10 between the United States and General Haftar over these oil
11 fields.

12 But even before that, as cited in our moving papers,
13 President Trump has had discussions directly with General
14 Haftar about how to fight terrorism and deter Libya's oil
15 resources. They've discussed a shared vision for Libya's
16 transition to a stable democratic political system.

17 So I think the answer is, no, there is not a formal
18 decision yet from the State Department, but we feel that there
19 is ample evidence that we --

20 (Telephone interruption.)

21 THE COURT: Wait. Why is there -- we shouldn't be
22 hearing any noise while one lawyer is speaking. I'm sorry.

23 Mr. Levin, can you repeat your last statement,
24 because it became garbled.

25 MR. LEVIN: Yes, Your Honor.

1 I was saying that there really -- there's ample
2 evidence that General Haftar is the head of the state, and
3 both from all the public reporting, and most recently this --
4 the negotiations between the United States Embassy and Libya
5 and General Haftar directly. We know he's been in touch with
6 the President of the United States. I don't believe there is
7 a formal ruling from the State Department like in the *Samantar*
8 case.

9 But in this particular case, we feel that there is
10 ample evidence that he is the head of the state. The
11 plaintiff has not identified anyone else who is the head of
12 the state. And frankly, it's a question that I don't think
13 the Court need even reach to dismiss the case because there
14 are other -- there are other ways that the case can be
15 dismissed without having the executive branch weigh in.

16 And, in fact, it dovetails -- if I may, Your Honor,
17 it dovetails into this issue of a nonjusticiable political
18 question. They're interrelated doctrines. But what the Court
19 is being asked to do is adjudicate Haftar's armed forces in a
20 way that directly implicates the doctrine of the
21 nonjusticiable political question. And I don't believe that
22 there's any law that requires the executive branch to weigh in
23 on whether it's a nonjusticiable political question.

24 The Supreme Court in *Baker v. Carr* laid out this
25 doctrine and it was adopted by the *Schneider v. Kissinger*,

1 which we outlined in our moving papers. But one such -- one
2 such -- the presence of a number of different facts would make
3 it such that it's a nonjusticiable political question. And
4 one of them is the possibility of a Court's undertaking
5 independent resolution without expressing a lack of respect to
6 coordinate branches of government.

7 And here, this is basically exactly asking the Court
8 to adjudicate just that. So I don't believe that there's any
9 reason to go to the State Department to get them to render a
10 formal decision when there are other ways that -- there are
11 other reasons that the case should be dismissed.

12 THE COURT: All right. You know that though --

13 MR. LEVIN: And it should be dismissed.

14 THE COURT: -- this Court has taken the position
15 that even the United States government does not have sovereign
16 immunity against claims that's been involved in jus cogens
17 violations. And so, I think regardless of some of the
18 arguments you've made, if there is sufficient allegation in a
19 complaint of those types of human rights violations, at least
20 at a pleading stage, that's sufficient to let it survive.

21 I mean, again, we're not -- even though I think your
22 motions are -- these are motions to dismiss, they're not
23 motions for summary judgment, and they couldn't be at this
24 point because there's not been any discovery conducted. I
25 mean, there are other problems with these cases just given the

1 nature of what's alleged and the types of discovery one might
2 need to have before they could be ready for summary judgment.
3 But in terms of -- I want to try to at least pare these cases
4 down somewhat.

5 So let me ask defense counsel -- I'm sorry
6 plaintiff's counsel, starting with you, Mr. Gill, if, in fact,
7 you feel you can save any of your state law claims.

8 MR. GILL: Yes, Your Honor, I believe I can. I
9 mean, at the end of the day, Your Honor, Mr. or General Haftar
10 is a U.S. citizen. He is a Virginia resident, and he is
11 committing what we believe to be these atrocities. He's
12 committing murder. He's committing -- he is bombing. He is
13 killing. Therefore, we believe that under state law, he
14 should be liable for those claims.

15 A U.S. citizen, a Virginia resident, if he does that
16 anywhere else, they would be liable. For that reason, I do
17 believe the state law claims would survive at least at this
18 stage.

19 Now, I would have to make out the case for it all,
20 which we believe, when we get to the discovery phase, that we
21 believe that we can make the case for it.

22 THE COURT: Well, if a Virginia resident went into
23 Maryland and committed the torts in Maryland, where would the
24 tort litigation occur?

25 MR. GILL: Your Honor, if a Virginia resident

1 committed the tort in Maryland, I would argue that it could --
2 more than likely would occur in Maryland since that is where
3 the actions took place. But I do also feel that Virginia
4 courts could also have jurisdiction over its own resident.
5 Certainly, a Virginia prosecutor could charge the person for
6 committing some of these things. And again, we're charging
7 him with wrongful death.

8 THE COURT: Whoa, whoa, whoa. I don't think you're
9 right on criminal law. If a Virginia resident went over to
10 California and committed a crime in California, the Virginia
11 courts couldn't handle that. That's a California court.

12 MR. GILL: Well, that's what normally happens, Your
13 Honor. But I think in our case -- I'm handling a criminal
14 case right now in Southern District of Indiana, where the
15 majority of the actions occurred in Michigan. But if there's
16 a slight connection in the State of Indiana, the federal court
17 claimed that jurisdiction there. It all depends on --

18 THE COURT: Right, but it has to be an act. It
19 can't just be the status of the person is a citizen of that
20 state. I've never seen that in a criminal case.

21 You're right, it only takes -- it only takes an
22 e-mail message into the jurisdiction or you're flying through
23 Dulles Airport and everything else occurs outside of some
24 other location. That one minimal contact with the forum can
25 do it.

1 But you don't allege -- neither plaintiff has
2 alleged, in either of their complaints, that any of the
3 actions that are described in these two complaints had any --
4 any connection whatsoever to this district other than the fact
5 that the defendants are U.S. citizens who own property in
6 Virginia.

7 Is that not correct, Mr. Carroll? Do you agree?

8 There's nothing that I see in the complaints that
9 would suggest that any of the Virginia causes of action can go
10 forward.

11 MR. CARROLL: Your Honor, this is Kevin Carroll.
12 Both defendant's arguments about the state law claims were
13 well put, and we're prepared to waive those. This is at heart
14 a Torture Victim Protection Act case and we strongly disagree
15 with the arguments on the TVPA.

16 THE COURT: Okay. All right. I think, Mr. Gill,
17 those portions of the complaints that are alleged Virginia
18 causes of actions. In the one case, there's a time bar
19 problem, too, because those events are alleged to have
20 occurred in 2014, and there's a two-year statute of
21 limitations for these types of torts in Virginia.

22 Also, I just don't see how there's any connection
23 between those activities and the forum other than the fact
24 that the defendants owned property. There's no allegation the
25 property was used somehow to support these activities.

1 It's just -- there's just nothing. So the state law claims in
2 both complaints will be dismissed.

3 Then in terms of the Alien Tort Claims Act, I'll
4 have the plaintiffs respond on those first.

5 MR. GILL: I'm sorry, Your Honor, was that directed
6 towards me?

7 THE COURT: Yes, Mr. Gill.

8 MR. GILL: Faisal Gill. Okay.

9 Yes, Your Honor. We believe the Alien Tort Claims
10 Act does survive because, unlike in other cases, the biggest
11 one being the *Warfaa v. Ali* case, this case here, there is a
12 U.S. citizen involved. So for that reason we believe that it
13 does touch and concern the United States, which is what the
14 Supreme Court has stated.

15 So because Mr. -- General Haftar is a U.S. citizen,
16 we believe that the Alien Tort Claims Act does survive. And
17 that was the main distinction between what we have in our
18 facts and what was in the *Warfaa v. Ali* case.

19 THE COURT: All right. Mr. Levin, do you want to
20 respond to that?

21 MR. LEVIN: Your Honor, I do. I disagree with that.
22 I mean, the Alien Tort Claim Act really -- it is a
23 jurisdictional statute and it basically -- to go forward, a
24 claim has to touch and concern the U.S. with sufficient force
25 to displace the presumption against extritoriality where

1 there is a presumption here. And at least the Ninth Circuit
2 has weighed in on this in the *Mujica* case, that U.S. citizen
3 alone does not satisfy this test.

4 Once again, nothing happened here in the United
5 States. They're trying to ram a lot of behavior, alleged
6 behavior through this that all took place outside of the
7 United States through the notion that because he is a U.S.
8 citizen, he can be held responsible. But the behavior -- just
9 like the Virginia tort case, the Virginia tort claim, the
10 Alien Tort Claims Act simply does not apply unless the conduct
11 of the claims themselves touch and concern the United States
12 to -- this was not forced to displace this presumption. We
13 just have a disagreement that the U.S. citizenship alone would
14 satisfy this test. And there is precedent. There aren't a
15 lot of cases on this point, but to the extent that there are
16 any cases -- there's this Ninth Circuit case, *Mujica*, that
17 takes the exact position that I'm espousing here.

18 THE COURT: All right. And, of course, again, I
19 have the *CACI* case, which you've also mentioned in your
20 papers, and there it's a very different situation because the
21 defendant corporation is a U.S. corporation. Although all the
22 events occurred in Iraq, they occurred because -- the
23 connection to the United States is that the corporate
24 defendant was functioning in Iraq under a contract that had
25 the U.S. government. It was taking -- it's allegedly taking

1 directions from U.S. military.

2 In other words, there was definitely clear
3 connections with the United States that would give us a basis
4 to find that, you know, there was the kind of contact with
5 this country that would give us the extraterritorial reach for
6 that conduct.

7 That's totally different, again, because there's
8 nothing in these complaints that have that kind of linkage.
9 And even the timeframe is problematic. Although, one of the
10 complaints, I think in *Elzagally*, it alleges that Haftar left
11 the United States or the Northern Virginia in 2015. I note
12 that the *al-Suyid* case alleges that he left in 2011. And it
13 appears as though that that 2011 date is the more accurate
14 date.

15 So today is now 2020, and at least, you know, within
16 the four corners of these complaints, it would appear as
17 though Haftar has not even been in the district for quite some
18 time. Even if he's coming back and forth and making an
19 occasional visit, again, there's been no description of any
20 activity in the forum, in the United States, that is connected
21 to the events in Libya other than this man's citizenship.

22 So at least as the complaints are currently
23 structured, I don't see how one can argue that there's enough
24 in the complaint to support an alien tort claim.

25 Does either plaintiff's counsel want to add anything

1 to this?

2 MR. CARROLL: Your Honor, Kevin Carroll. Just
3 stating for the record that our complaint does not include an
4 alien tort statute.

5 THE COURT: Right. Yours is the TVPA. I understand
6 that.

7 But, Mr. Gill, is there anything further you want to
8 add?

9 MR. GILL: Your Honor, I would only add that in the
10 *Kiobel* case, the Supreme Court did state, although broadly
11 stated, it's the claims rather than the alleged tortious
12 conduct that must concern the United States territory with
13 sufficient force.

14 And we believe the fact that he is a U.S. citizen
15 satisfies what, you know, *Kiobel* is saying, if you broadly
16 construe it. But all the actions (audio interruption), but as
17 long as there is some testing and concern, and certainly the
18 fact that he is a U.S. citizen absolutely touches and concerns
19 the United States that satisfies what we believe in *Kiobel*.
20 And as you cited in *CACI*, it was U.S. contractors. It was a
21 U.S. company. Yes, they were operating and/or operating in
22 Iraq. So in that sense, we do believe that there -- it is
23 fairly similar.

24 THE COURT: I think there is significant factual
25 differences between -- it's not even close. As I said

1 earlier, there is far more direct connection between the
2 United States and that. It's not just a corporation that
3 happens to be doing something in a foreign country. So I'm
4 going to grant that portion of the motion to dismiss.

5 So that leaves in both cases then the TVPA claim,
6 which is the core complaint of the claim here.

7 And on that one, I recognize that there are a lot of
8 these technical arguments that are made by the defendant, but
9 I certainly think that the allegations are very problematic.
10 I mean, there are allegations of some very, very serious
11 conduct. Especially in the -- in the *Elzagally* case. These
12 two cases are hard to do separately because there is such a
13 great deal of overlap.

14 But *Elzagally* only lists Mr. Haftar as the
15 defendant, correct? And the *al-Suyid* case also includes the
16 sons.

17 I wanted to address that one next. That's right.

18 Mr. Carroll, that's your case. What evidence do you
19 have at this point that would, other than sort of information
20 and belief or suspicion, that the two sons are at all involved
21 in the specific allegations that the plaintiffs are raising?

22 MR. CARROLL: Thank you for asking, Your Honor.
23 Again, this is Kevin Carroll. Both of the sons were battalion
24 commanders in the Libyan National Army in Benghazi in
25 October/November 2014. And that is where the --

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23

1 THE COURT: Wait, I'm sorry. Mr. Carroll, I don't
2 know what you're talking on, but you're breaking up.

3 Are you on a speakerphone or on a computer? Hello?

4 MR. CARROLL: Hold on, Your Honor. Sorry, Your
5 Honor. I took it off speaker. Is that better?

6 THE COURT: Much better. Go ahead.

7 MR. CARROLL: Okay. Thank you, Your Honor. I'm
8 glad you asked the question. Khalid and Saddam Haftar were
9 both battalion commanders in the Libyan National Army --

10 THE COURT: Wait, wait. I'm sorry. Wait. Slow
11 down, please.

12 (Court reporter clarification.)

13 THE COURT: Start over again, please, Mr. Carroll.

14 MR. CARROLL: Yes, Your Honor. Khalid and Saddam
15 Haftar were both battalion commanders in the Libyan National
16 Army in Benghazi in October/November of 2014, when the crimes
17 in question took place. Our understanding is that the officer
18 corps of the Libyan National Army that was present in
19 Benghazi, when the war crimes took place, only amounted to 27
20 officers.

21 They served as close adjutants to their father.
22 Saddam Haftar is additionally involved in fundraising for the
23 Libyan National Army.

24 So I think that under the doctrine of command
25 responsibility, which even impacts decisions, field grade

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1 officers at the battalion commander level, ten colonels
2 present while war crimes are taking place, would be liable as
3 well.

4 THE COURT: All right. Mr. Levin.

5 MR. LEVIN: Thank you, Your Honor. This is Duncan
6 Levin. I have to say I have been scratching my head at this
7 one because we've been looking through the complaint for any
8 specific evidence that the sons, in fact, are alleged to have
9 been tied to any specific incidents at all, which they are
10 not. The theory is under this command responsibility
11 doctrine, which we, of course, adopt just like the Court has.
12 But if you look -- if Your Honor looks at the elements of it,
13 that's been laid out in the *Drummond's* case.

14 If I may: "The existence of a superior subordinate
15 relationship between the commander and the perpetrator of the
16 crime..." which has not been laid out, "that the commander
17 knew or should have known, owing to the circumstances at the
18 time, that his subordinates had committed, were committing, or
19 plan to commit acts violative of the law of the war," which
20 has not been laid out, "and that the commander failed to
21 prevent the commission of the crimes or failed to punish the
22 subordinate after the commission of the crimes." Which has
23 not been laid out.

24 If I may offer my observation, I believe that the
25 plaintiffs have included the sons because they owned property

1 in the United States and they are trying to pierce the veil
2 and somehow try to get at the sons' property in the United
3 States. But frankly, there are just no facts whatsoever in
4 its complaint that specifically ties the sons to any of the
5 activities whatsoever.

6 There were, assuming that there were 27 officers, as
7 the plaintiffs just laid out, the plaintiffs' theory could be
8 viewed that all 27 officers are liable. But not all of the 27
9 would be in the chain of command as to the acts. And there's
10 just no showing that the sons are, in fact, in the chain of
11 command as to the allegations.

12 The complaint is just devoid of anything regarding
13 the sons. And we submit that for these reasons, the claims
14 against the sons should be dismissed.

15 THE COURT: All right. Mr. Carroll, do you want to
16 have the last word on that?

17 MR. CARROLL: Yes, Your Honor. As the complaint
18 lays out, we know the three-star who is responsible, Khalifa
19 Haftar. We know the two-star major generals who were
20 responsible for the atrocity by name.

21 We know the full-bird colonels who were responsible
22 for the atrocities, and we know that the sons were battalion
23 commanders. So we know exactly who committed the crimes at
24 the three-star corps level, the two-star division level, the
25 full colonel brigade level, and we know that the sons were

1 lieutenant colonels present in the city while this was going
2 on.

3 And this would seem to me to be a good subject for
4 discovery, to see exactly what full colonel -- Lieutenant
5 Colonel Saddam Haftar, Lieutenant Colonel Khalifa Haftar
6 reported to while they were in Benghazi, while the war crimes
7 were taking place in the fall of 2014.

8 THE COURT: Well, you know, that's not really the
9 way in which civil litigation is supposed to be conducted in
10 federal court. I mean, the lawyers are supposed to have a
11 decent understanding of the facts and not just file the
12 complaint and then hope that the discovery will support their
13 position.

14 I am going to grant the motion to dismiss the sons.
15 The complaint as written right now before me simply does not
16 have enough in it.

17 However, as to Mr. Haftar himself, those -- there
18 are certain paragraphs in this complaint that have the kind of
19 specificity that would clearly be sufficient at this pleading
20 stage to allow the case to go forward against him under the
21 command control doctrine. In particular, I suppose it's
22 paragraph 46 is the most compelling, where it's alleged that
23 Khalifa released a video announcing that LNA's opponents would
24 be shown "no mercy." But there is no prisoner -- that
25 prisoners are -- no prisoner -- no prison for them, that the

1 field is the prison, end of story.

2 And then there's also reference in paragraphs 27 and
3 35 to other statements made by LNA's. There's a video
4 announcement that the opponents will all be liquidated. And
5 another one indicating the expulsion of certain groups from
6 Benghazi, and that the plaintiffs in this case were among
7 those types of folks.

8 So I think there's enough in that complaint to allow
9 the allegations against Haftar himself to go forward, but not
10 the sons. So I will be granting that portion of the motion to
11 dismiss as well.

12 So essentially, what that's leaving in both cases is
13 the TVPA claim. And I recognize the defendant has made a
14 bunch of other arguments about that.

15 In terms of the service argument, although it is
16 true that it does appear to be a technical problem with
17 service, the whole point behind the service rules, in my view,
18 is to make sure that due process is protected. And what due
19 process provides is that there be notice and an opportunity to
20 be heard. And whether that notice came through the media or
21 some other kind of means, certainly the defendants were aware
22 of the lawsuit.

23 They were able to retain you, Mr. Levin, and you've
24 articulated very strong arguments on their behalf. You came
25 in after the defaults had been entered, and we set aside the

1 defaults so that your clients now have their opportunity in
2 court to respond to the allegations. And I don't know why
3 that's not sufficient to get around the service issue.

4 MR. LEVIN: May I address that, Your Honor.

5 THE COURT: Yeah.

6 MR. LEVIN: Thank you. Your Honor, I think, if I
7 may. If that is true, then what the Court is saying, in
8 essence, is that there's no way for a defendant to come into
9 federal court and argue service failure, because the service
10 rules are meant to ensure that the -- that a defendant is
11 apprised of a case against him or her.

12 In this particular case, the service was not
13 effectuated properly. We've timely raised the problems with
14 it. And these are more than technical violations, because
15 what we've done is, we've come in to argue service. But what
16 the Court is saying is, by the mere fact that he is now aware
17 of the case, has hired counsel, and come in to argue it, that
18 no one can bring a lawyer into court and argue service because
19 they are, by definition, aware of the fact that there is a
20 lawsuit.

21 And so, I do think that the issues are more than
22 just technical. Both of the cases certainly were served
23 improperly in different ways. But I -- I fully hear what the
24 Court is saying. But I do think that the Court's position
25 would not allow defendants to come in and argue service

1 because they would, by definition, have a lawyer be arguing
2 about something that they knew about.

3 THE COURT: Well, I mean, again, as I said, if the
4 whole purpose, and it's a good purpose, behind the service
5 rules is to ensure that a party is on notice as to the case
6 that's been brought against them and has a chance to respond
7 to it.

8 In my view, it's meant to prevent, you know,
9 improper defaults, and that's exactly what's happened here.
10 You've got notice of it. Had the default judgments been
11 entered down the road and you've come in and try to have them
12 set aside, this would possibly be a different situation. But
13 at this point, I don't think that due process has been
14 violated.

15 I mean, your clients know about this case. Two of
16 them have been dismissed, and we only have one claim per each
17 case against Khalifa Haftar. And as to that, then you've got
18 these other sort of meatier issues about whether this is an
19 improper political question that the Court does not have the
20 authority to address. The head of state immunity argument, I
21 don't think, at this point, has -- I'm not at all concerned
22 about that.

23 As I've said, these are allegations of jus cogens
24 violations. And even if he had some sort of immunity, it
25 doesn't protect, in that respect, in my view, not in these

1 types of cases.

2 So I'm going to go ahead and at this point allow the
3 TVPA claims to go forward in each of these complaints. I
4 don't have any idea how in the world the plaintiffs will get
5 discovery. My experience with the Somali cases that I had was
6 it took years to get that discovery. And I think that the
7 kind of activity that's going on right now in Libya is much,
8 much stronger. I am, to make sure that we are not going to
9 bump into a political question problem, however, going to
10 follow the same route that I took in the *Samantar* case. And
11 that is, I am going to address a letter to the State
12 Department advising them essentially of what's before the
13 Court in both these cases and give them an opportunity -- give
14 the Department an opportunity to express its position. That's
15 the safest way of handling these two cases.

16 And that being the situation, what I'm going to do
17 is, I'm not going to issue a scheduling order at this point.
18 I'm going to stay both cases. I'm going to give the State
19 Department 60 days to voice any position, if it has one. If
20 it doesn't do anything, then I'm going to assume the U.S.
21 government doesn't have a concern about it. If they do, then
22 we will, at that point, address what, if any, impact that
23 position has on going forward with the remaining claim.

24 MR. LEVIN: Judge, this is Duncan Levin. If I may
25 just address that. One issue for the Court is whether, if

1 there is a change in administration, allowing -- part of the
2 issue is presenting a nonjusticiable political question is
3 that the Court, respectfully, should not be stepping on the
4 toes of the executive branch on something that has significant
5 political overtones that obviously is at the core of diplomacy
6 between the countries and the United States with regard to
7 peace in the whole region.

8 As the election is coming up, if there is a change
9 in administration, we would agree that -- depending on how the
10 election holds, we may come back to the Court on the issue of
11 a stay for 60 days, and whether that would hamstring the next
12 administration, if there is a change of administration.

13 THE COURT: Mr. Levin, that's a reasonable request.
14 And so, as I said, I'm going to stay the cases right now. And
15 60 days from now would clear the election, so we would know,
16 assuming we would know by that point what the outcome is, and
17 depending upon that you can renew the -- ask for an extension,
18 if it goes the other way. All right.

19 MR. LEVIN: Your Honor, if I also may just address
20 one other issue that the Court raised earlier that I didn't
21 have an opportunity to address.

22 The Court addressed some of the comments allegedly
23 made by General Haftar showing that -- announcing that LNA
24 opponents allegedly would be shown no mercy. I just wanted to
25 address, in the broadest terms, those comments.

1 One is that, I just want to be clear that we are not
2 asking the Court to say things are right or wrong. I'm a
3 lawyer based in the United States, looking at whether this
4 fits the criteria of the statute. So I know the Court said
5 that the allegations are very problematic, and I'm not -- it's
6 not our position to ask the Court to weigh in on whether the
7 allegations are right or wrong, but whether the statute is
8 met.

9 And those comments just -- just so the record is
10 clear on it, those comments were made allegedly after the date
11 that the conduct alleged to commit -- to have been committed
12 by General Haftar took place.

13 So the allegations are that the conduct took place
14 and that those comments took place after the allegations, not
15 before the allegations. So I don't -- I don't particularly
16 think they're relevant or, in fact, weigh at all as to General
17 Haftar's involvement in these alleged activities.

18 And then the other thing is just -- I did -- I do
19 want to address this notion of exhaustion of remedy is because
20 it's something that we have not had an opportunity to address
21 yet in this -- in this argument. But I do think that there is
22 an element that is not -- it is not a technical requirement
23 under the TVPA that a plaintiff has to exhaust local remedy.

24 And I think it's interesting that the Muna al-Suyid
25 plaintiff has basically thrown their hands up at this whole

1 notion and they're citing to the *Mugabe* case, that the
2 then-president of Zimbabwe, who disregarded a number of
3 Zimbabwean court rulings, and that the *Elzagally* plaintiffs
4 have basically said that they can't pursue anything that would
5 be in court.

6 I don't think there's -- first off, there's no
7 evidence in the record that the Libyan courts are not a proper
8 place to pursue these claims, and they haven't even tried.

9 So I -- and to the extent that the *Elzagally*
10 plaintiff have even tried, other than serve -- submitting one
11 affidavit saying that they served General Haftar in a Libyan
12 court -- which by the way, I will just mention, was
13 in Tripoli, when they knew full well that General Haftar
14 controls Benghazi, but not Tripoli. There's a civil war going
15 on.

16 I just think that their lack of even trying to
17 pursue these claims in the course of Libya is like skipping
18 over a prerequisite that is codified in the -- in the Torture
19 Victim Protection Act.

20 Again, I'm not trying to ask the Court to say that
21 what is alleged is not horrendous. I'm not trying to ask the
22 Court to make a value judgment. I'm just trying to look at
23 what the statute itself says and whether the plaintiffs have
24 met their burden. Exhaustion of remedy is just clearly part
25 of it, but they haven't even tried. They haven't said they've

1 tried it. They've just sort of thrown up their hands with
2 that. And I know you've heard my arguments on the other piece
3 of this, which is that the killings weren't extrajudicial or
4 deliberate.

5 But I do want to mention that in the TVPA, the
6 Senate Report itself specifically carved out liability for
7 collateral civilian casualties resulting from legitimate
8 military operations undertaken in the civil war. I think
9 Congress looks at these issues specifically in the TVPA and
10 they said, number one, exhaust your remedies in a foreign
11 country.

12 The plaintiffs in both of the cases haven't done it.
13 They haven't said they've done it. They've basically argued
14 that they don't need to do it, and they haven't reported
15 back -- they're in different situations with regard to
16 exhaustive remedies. But neither of them have -- I don't
17 think that that is a technical requirement at all.

18 And secondly, I just don't think they've -- they're
19 trying to create liability under the TVPA for something that
20 the United States Congress had specifically carved out. The
21 Senate Report itself specifically addresses civil war. It
22 specifically addresses this in the Senate Report on the TVPA.

23 And so, I fully understand when the Court reads
24 these allegations, understanding that they are "problematic,"
25 as Your Honor has said. I don't ask the Court to weigh in on

1 that.

2 I just ask the Court to look at the actual -- the
3 intent of Congress in making this law and then the specific
4 requirement that they exhaust local remedy.

5 THE COURT: Well, as you know, that they've
6 referenced to this Amnesty International report and other
7 reports that even from their our own State Department
8 commenting upon the situation of the court system in Libya
9 right now. And some of the cases that you cite to do involve
10 situations where the civil war conflict has ended and then the
11 parties are able to use the court system that exists.

12 But at this point, again, I think given what I've
13 got before me at this point, I'm satisfied that there's enough
14 evidence that the functioning of the Libyan courts will not be
15 sufficient to give them an -- a fair opportunity to raise
16 these issues there. So I'm not going to change my view at
17 this point.

18 So, as I've said, I'm allowing those two claims to
19 go forward. One claim per complaint. I'm staying the case
20 for 60 days to see if the State Department is going to make
21 any statement. I will send you, obviously, copies of the
22 letter that we send to State. It will probably get out
23 tomorrow.

24 If it would assist the process, if either of you
25 might know what desk or office at the State Department is

1 responsible for what's going on in Libya. I have trouble
2 believing that some of you might not know that.

3 MR. CARROLL: Your Honor, this is Kevin Carroll. It
4 would be at least the Near East desk.

5 THE COURT: Just the Near East desk.

6 MR. CARROLL: At the Department of State.

7 THE COURT: All right. That's what we'll do. All
8 right. Thank you gentlemen for calling in. We got through it
9 with the technology being what it is. We'll get an order out
10 to you today. We're signing off.

11 MR. LEVIN: Thank you, Your Honor.

12 MR. CARROLL: Thank you, Your Honor.

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14 **(Proceedings adjourned at 3:55 p.m.)**
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CERTIFICATE OF REPORTER

I, Tonia Harris, an Official Court Reporter for the Eastern District of Virginia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Motions hearing in the case of the **AIDA ELZAGALLY, et al., versus KHALIFA HAFTAR, et al.**, Civil Action No. 1:19-cv-853 and 1:20-cv-170, in said court on the 29th day of September, 2020.

I further certify that the foregoing 37 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, my computer realtime display, together with the backup tape recording of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this October 9, 2020.



Tonia M. Harris, RPR
Official Court Reporter